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Outhuijse, Annalies; Cseres, K.J.

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Parallel Enforcement and Accountability: The Case of EU Competition Law.

by Annalies Outhuijse & Kati Cseres

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Parallel enforcement and accountability: the case of EU competition law

Katalin Cseres and Annalies Outhuijse

1 Introduction

Competition law has been a fundamental area of EU law ever since the establishment of the Treaties of Rome in 1957.¹ EU competition law consists of specific substantive rules, such as the prohibition of anti-competitive agreements and abuse of a dominant position (Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU)), as well as procedural rules laid down in Regulation 1/2003 and various soft law instruments. While the Commission had a central role in the enforcement of Articles 101 and 102 TFEU until 2004, this was fundamentally changed by Regulation 1/2003 in 2004,² which delegated enforcement powers to national competition authorities (NCAs) and national courts in order to relieve the Commission of its increasing administrative burden and make enforcement more effective. Article 3(1) of Regulation 1/2003 imposed an obligation on NCAs to apply Articles 101 and 102 TFEU in parallel with their national competition rules when ‘effect on trade between Member States’ can be established.

Accordingly, EU competition law is today enforced by the EU Commission and 28 NCAs, in a multi-level governance system composed of EU and national procedural laws. The NCAs and Commission have concurrent jurisdictions and there are neither territorial limitations to their enforcement powers nor a prohibition of parallel proceedings between the Commission under EU law and the NCAs under national law.³ In order to coordinate parallel proceedings between the Commission and the NCAs, Regulation 1/2003 established the European Competition Network (ECN) and laid down the rules of its core functions – case allocation and information sharing – in the so-called Network Notice.⁴ Hence Regulation 1/2003 created an enforcement system of parallel competences, in which a specific case can be dealt with either by a single NCA with or without the assistance of authorities from other

¹ The Treaties establishing the EEC and Euratom in 1957 were signed by Belgium, France, Germany, Italy, Luxembourg and the Netherlands in Rome and are therefore also referred to as the Treaties of Rome.

² Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

³ R Nazzini, ‘Fundamental Rights Beyond Legal Positivism: Rethinking the *ne bis in idem* Principle in EU Competition Law’ [2014] 2 Journal of Antitrust Enforcement 270, 275.

⁴ Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43 (Network Notice).

Member States, by several NCAs acting in parallel, or by the Commission acting on its own. It is this parallel enforcement system where the Commission and the NCAs share the enforcement of EU competition rules which will be investigated in this chapter.

In light of the focus of this book, this chapter analyses the shared enforcement of EU competition law from a political and judicial accountability perspective. Due to the particular function and organisation of shared enforcement of EU competition law, the chapter focuses on the accountability of the Commission and of the NCAs as well as the ECN as the main actors of the shared enforcement. We use two jurisdictions to illustrate the role and powers of the NCAs: the Netherlands and Hungary. Section 2 analyses the powers and roles of the three respective actors (the Commission, the NCAs and the ECN) of the parallel enforcement, section 3 examines judicial and political accountability and section 4 presents a conclusion.

2. The system of parallel enforcement of EU competition law

2.1 Powers of the Commission

Regulation 1/2003 strengthened the Commission's investigatory powers and remedial powers,⁵ and it extended its search and evidence collecting powers. Accordingly, the Commission has powers to execute all the stages of public enforcement: monitoring, investigation and sanctioning as laid down in Regulation 1/2003 (Articles 17–25).

Article 17 of Regulation 1/2003 is an important power regarding monitoring. On the basis of Article 17, the Commission can conduct sector inquiries about the functioning of specific markets.⁶ The Commission starts a sector inquiry 'when it believes that a market is not working as well as it should, and also believes that breaches of the competition rules might be a contributory factor'.⁷

The Commission has broad investigative powers under Regulation 1/2003, such as the power to request information (art 18), the power to take statements (art 19), the power to

⁵ Art 20 of Regulation 1/2003 empowers the Commission to seal premises for the period and to the extent necessary for the inspection. Art 21 of Regulation 1/2003 empowers the officials authorised by the Commission to enter non-business premises when there is a reasonable suspicion that books and other records relevant for the inspection are being kept there. This power will be exercised only where the suspected violation is serious and will be exercised under the control of national courts. Art 7(1) of Regulation 1/2003 enables the imposition of structural remedies and art 9 of Regulation 1/2003 grants the Commission the power to accept commitments from the parties under investigation in arts 101 and 102 procedures and to make these commitments binding.

⁶ See in general on this topic E Lachnit, *Alternative Enforcement of Competition law* (Eleven International Publishing 2016).

⁷ See <http://ec.europa.eu/competition/antitrust/sector_inquiries.html> accessed 4 November 2016.

inspect business premises (art 20) and the power to inspect private premises (art 21).⁸ The power to request information consists of two types of requests for information, namely simple requests (art 18(2)) and requests by decision (art 18(3)). The difference between the two options is that for the latter an answer is compulsory under threat of an administrative fine, while for the first option only wrong or misleading information can be sanctioned.⁹ Regulation 1/2003 provides three types of investigations for the Commission: inspections of business premises based on an authorisation from the DG Competition under Article 20(3) (announced inspections), inspections of business premises by formal Commission decision under Article 20(4) (unannounced inspections) and inspections of private premises by formal Commission decision combined with a national judicial authorisation under Article 21.¹⁰

Under Article 20(5), the NCA of the Member State in whose territory the Commission inspection is to be conducted is obliged to actively assist the Commission during the inspection at the request of the Commission. According to paragraph 6 of the same article, the NCA must request the assistance of the police or of an equivalent enforcement authority if the Commission finds that an undertaking opposes the inspection ordered. The NCA must also guarantee judicial authorisation if this is required according to the national rules.¹¹

Judicial review of this act by the national courts is limited to the arbitrariness and excessiveness of the coercive measures.¹² The Court of Justice of the EU (CJEU) confirmed in *Roquette Frères*¹³ and subsequent case law¹⁴ that only the EU courts have the competence to rule on the lawfulness of the inspection, which includes the necessity of the inspection and the adequacy of the reasons submitted by the Commission.¹⁵ The authorisation of the national court in whose territory the inspection is conducted is necessary when the investigation concerns private premises. The judicial control of the national courts in this case is also limited to the arbitrariness and excessiveness of the coercive measures.¹⁶ The Commission can request one of the NCAs to conduct the inspection on behalf of the Commission under Article 22(2). The NCAs are obliged to conduct the requested inspection and they do so on the basis of their national procedural law when exercising these powers.

⁸ See J Faull and A Nikpay, *The EU Law of Competition* (OUP 2014) 1135–222.

⁹ Reg 1/2003, art 23(1).

¹⁰ Faull and Nikpay (n 8) 1173.

¹¹ Reg 1/2003, art 20(7). This is for example the case in the United Kingdom.

¹² Faull and Nikpay (n 8) 1179 and 1208–9.

¹³ Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 47.

¹⁴ Case C-37/13 P *Nexans and Nexans France v Commission* [2014] EU:C:2014:2030, para 34; Case C-583/13 P *Deutsche Bahn v Commission* [2015] ECLI:EU:C:2015:404.

¹⁵ Faull and Nikpay (n 8) 1179 and 1208–9.

¹⁶ Reg 1/2003, art 21(3).

The undertaking can directly dispute the legality of the decisions ordering the inspection at the CJEU in an action for annulment under Article 263 TFEU. The use of evidence collected during the inspection can be disputed in an appeal against the fining decision. The CJEU ruled in *Orkem* that the undertaking has an obligation to actively cooperate during the investigation phase.¹⁷ This obligation requires that the undertaking ‘must make all information relating to the subject matter of the investigation available to the Commission’.¹⁸ The infringement of fundamental rights, such as the right against self-incrimination, is the limit of the duty to cooperate.¹⁹ Article 23 prescribes that non-cooperation for these investigative powers can result in sanctions, except for non-cooperation in case of inspections of private premises under Article 21. The undertaking can file an appeal for annulment against these fines at the CJEU (art 263 TFEU).

After the investigation phase, the Commission will decide whether a fine should be imposed or whether another remedy such as a commitment decision – in which case the undertaking promises to change its behaviour but no infringement is established – should be used.²⁰ If the Commission decides that a fine should be imposed, the Commission drafts a statement of objection in which the Commission describes the suspected infringement and the basis for this suspicion.²¹ The undertaking has the right to give its view on this statement of objection and has the right to be heard by the independent hearing officer.²² After the hearing, the Commission makes a draft decision which will be sent to the Advisory Committee, which consists of representatives of the NCAs, after which the final decision will follow.²³ The undertaking can file an appeal against the final decision at the General Court with the possibility of further appeal at the CJEU.²⁴

The Commission has a wide margin of discretion throughout the whole procedure, starting with setting priorities i.e. which cases it will investigate and whether a sanction will be imposed or not or whether a commitment decision is taken.²⁵ The Commission can start an investigation *ex officio* or upon a third-party complaint. The third party whose complaint is rejected by the Commission, in other words the Commission decides not to investigate the

¹⁷ Case C-374/87 *Orkem* [1989] ECR 3283, para 27.

¹⁸ *Ibid.*; Faull and Nikpay (n 8) 1145.

¹⁹ *Ibid.*

²⁰ Reg 1/2003, art 9.

²¹ Reg 773/2004, art 10.

²² *Ibid.*, arts 10(2), (3), and 11.

²³ Reg 1/2003, art 14.

²⁴ *Ibid.*, art 31.

²⁵ J Mendes, ‘Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law’ (2016) 53 CMLR 419.

case, can file an appeal at the CJEU under Article 263 TFEU.²⁶ The third party can also file an appeal where the Commission decides to make a commitment decision instead of a fining decision.²⁷

2.2 Powers of the NCAs

Article 35 of Regulation 1/2003 states that each Member State has to designate a NCA responsible for the application of Articles 101 and 102 TFEU. As a consequence of the principle of institutional autonomy, the Member States are free to design their own enforcement system.²⁸ The designated NCAs could, therefore, be administrative or judicial in nature. The Member States were obliged to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EU law.²⁹ The Regulation does not set any formal requirements concerning the internal organisation of the NCAs in relation to their independence. However, political independence of the NCAs has received considerable attention in recent policy documents.³⁰ EU law has, in other fields of economic regulation, focused on the independence of national regulatory agencies from market players,³¹ However, while EU law is considerably detailed concerning the concept of independence and the EU Courts emphasised the importance of independence in the context of regulated markets,³² the Courts have, so far, not formulated general principles on the independence of regulatory authorities.³³ Accordingly, while EU law requires regulators to be

²⁶ See also K Cseres and J Mendes, 'Consumers' Access to EU Competition Procedures: Outer and Inner Limits' (2014) 51 CMLR 483.

²⁷ Case C-441/07 *Alrosa* [2009] ECR I-05949.

²⁸ See on this topic M Scholten and A Ottow, 'Institutional Design of Enforcement in the EU: the Case of Financial Markets' (2014) 10(5) ULR 80.

²⁹ Point 2 Network Notice (n 4). See also Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005] ECR I-7879, paras 46–55.

³⁰ European Commission, Commission Staff Working Document – Enhancing competition enforcement by the MS' competition authorities: institutional and procedural issues (European Commission 2014), available at <http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf> accessed 5 November 2016

³¹ It was in 1988, in Directive 88/301 on competition in the markets in telecommunications terminal equipment that the Commission introduced in art 6 an obligation on the Member States to entrust the regulation of terminal equipment to a body independent from market parties active in the provision of telecoms services or equipment. This requirement of independence has also been implemented in the second liberalisation package in the energy and telecoms sector.

³² See Case C-202/88 *France v Commission* [1991] ECR I-1223, paras 51–52; Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5973, paras 25–26; Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* [2009] ECR I-1265.

³³ The latest package of liberalisation Directives of 2009 mentions a general principle of independence

independent from political institutions, it has not laid down the criteria of independence that regulatory authorities must meet.³⁴ Correspondingly, Regulation 1/2003 does not specify any sort of requirements on the formal independence of NCAs.³⁵ Guidi's study on the independence of NCAs shows a large variation across Member States concerning institutional, personal and financial independence from central governments.³⁶ The Commission has recently started to plead for more independence for NCAs in order to enhance further the enforcement of EU competition law.³⁷ Article 4 of the recently proposed Directive on empowering NCAs³⁸ lays down detailed requirements on the independence of the NCAs from both political as well as market parties. At the same time, the proposed Directive obliges Member States to subject NCAs to proportionate accountability requirements as will be explained in section 3.1..

As mentioned above, Article 3(1) of Regulation 1/2003 imposes an obligation on the NCAs and national courts to apply Articles 101 and 102 TFEU in parallel with their national prohibitions when effect on trade between Member States is at stake.³⁹ Article 3(2) of the Regulation encapsulates the supremacy rule of EU law and the EU interpretation of Article 101 TFEU. Stricter national cartel prohibitions are allowed, as long as these do not apply to agreements, concerted practices and decisions of associations of undertakings that may fall within the jurisdictional scope of the EU competition rules. In practice, a high degree of

towards the legislative and executive organs. Art 35 of Directive 2009/72 on electricity compels Member States to make the regulatory authority 'functionally independent from any other public or private entity' and give it the autonomy to decide 'independently of any public body'. Art 39 of Directive 2009/73 for gas formulates the same obligation. Directive 2009/140 on electronic communications states that 'national regulatory authorities responsible for *ex-ante* market regulation or for the resolution of disputes between undertakings' (...) 'shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law'.

³⁴ C Hanretty, P Larouche and A Reindl, 'Independence, Accountability and Perceived Quality of Regulators' (CERRE Report 2012).

³⁵ Case C-53/03 *Syfait* [2005] ECR I-04609, paras 31–36.

³⁶ The most recent and comprehensive study on the issue of the formal independence of NCAs is the work of Guidi who shows extensive variations in independence among the NCAs. However, Guidi's study raises the question of how an NCA's *de iure* independence reflects its *de facto* independence. Mattia Guidi, 'Delegation and Varieties of Capitalism: Explaining the Independence of National Competition Agencies in the European Union' (2014) 12 CEL 343-365.

³⁷ European Commission (n 30).

³⁸ Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM (2017)0142 final.

³⁹ European Commission, *Commission Staff Working Paper of 29 April 2009 accompanying the Report on the functioning of Regulation 1/2003* (SEC 2009), paras 141–142 and 152. Supremacy of EU competition law over national competition law has been established by Case C-14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR I-0001, but only for cases where an exemption under art 101(3) has been granted. See also more recently Case C-17/10 *Toshiba* [2012] ECLI:EU:C:2012:72.

Europeanisation of competition laws exists due to the fact that most national competition laws mirror the European prohibitions.⁴⁰

Regulation 1/2003 contains some basic rules on the powers of the NCAs. Article 5 lists the types of decisions which the NCAs can take when they apply Articles 101 and 102 TFEU: finding an infringement; ordering interim measures; accepting commitments and imposing fines. The strict interpretation of Article 5 leads to the conclusion that the NCAs are not empowered to establish the non-infringement of Articles 101 or 102 TFEU as the General Court ruled in *Tele2Polska*.⁴¹

Regulation 1/2003 does not regulate the procedural rules to be followed by the NCAs.⁴² This means that the NCAs apply the same substantive rules, but act on the basis of different procedural laws. This approach respects the procedural autonomy of the Member States.⁴³ This freedom is, however, not unlimited. This procedural autonomy finds its limitations in the principles of equivalence and effectiveness.⁴⁴ Another limitation can be found in Article 4(3) TEU which requires the Member States to take all appropriate measures to ensure fulfilment of the obligations arising from the EU Treaty and facilitate the achievement of the EU's tasks. The newly proposed Directive on empowering NCAs puts forward rules that could enhance the effectiveness of NCAs when they enforce EU competition law rules.⁴⁵ The proposed rules address independence and resources of the NCAs, decision-making and investigative powers, the issuing of fines, a common set of leniency conditions and mutual assistance. If the Directive is approved and implemented, it can form a major step in harmonizing the currently diverging procedural rules of public enforcement.

In current practice, the procedural rules differ among the Member States for the different stages of enforcement (monitoring, investigation and sanctioning (see Chapter 1)), for judicial review, as well as for the ability of NCAs to formally set enforcement priorities.⁴⁶

⁴⁰ European Commission, *Pilot field study on the functioning of the national judicial systems for the application of competition law rules* (2014).

⁴¹ Case C-375/09 *Tele2 Polska* [2011] ECR I-03055.

⁴² European Commission (n 39).

⁴³ Case C-68/88 *Greek Maiz* [1989] ECR I- 02965.

⁴⁴ Case C-439/08 *VEBIC* [2010] ECR I- 12471.

⁴⁵ Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM (2017)0142 final. See on the effective national enforcement by the NCAs: A Outhuijse, The shared enforcement of antitrust cases: effectivity difficulties at the national level, <<http://eulawenforcement.com/?p281#more-281>> accessed 19 July 2017.

⁴⁶ ECN's Working Group on cooperation issues and due process monitors this voluntary convergence among the Member States. Individual Reports provide an overview of the different systems and

These differences may have far-reaching consequences in the enforcement of Articles 101 and 102 TFEU, such as the difference between monetary and custodial sanctions. In some Member States custodial sanctioning for natural persons and liability of associations of undertakings is possible, while in others it is not.⁴⁷

Similar to the Commission, most NCAs have the competence to conduct market inquiries although their market scans are limited to their national territory.⁴⁸ The NCAs' specific investigative powers depend on the respective procedural framework, but are in general quite similar to the investigative powers of the Commission.⁴⁹ For example, the Netherlands Authority for Consumer and Markets (ACM) has the power to request information, power to take statements, and power to inspect business and private premises.⁵⁰ Undertakings investigated by the ACM also have to cooperate under the threat of sanctioning.⁵¹ Likewise, the Hungarian Competition Authority (*Gazdasági Versenyhivatal* (GVH)) has the following investigative measures when it acts during competition proceedings: request for information; hearing of witnesses; access to documents; on-site inspection without prior notification, based on a judicial authorisation, at business and private premises; seizure; sealing; or the making of forensic images of a computer database.⁵² The undertaking also has the duty to cooperate.⁵³

In most Member States, the NCA has the possibility to impose a fine after the investigations phase, and this is the case both in the Netherlands and in Hungary.⁵⁴ In the Netherlands, the department that imposes the fine is separated from the department that conducts the investigations. Article 12q of the Dutch Establishment Act ACM requires the ACM not to involve the persons investigating an infringement in the decision-making concerning the fine. An infringement of this article leads to the annulment of the fine if the fining decision is appealed in court.⁵⁵ The decision-making department has full discretion to

procedures for antitrust investigations within the ECN (2012) <<http://ec.europa.eu/competition/ecn/documents.html>> accessed 12 November 2016.

⁴⁷ See on this topic P Whelan, 'Criminal Antitrust Enforcement and Procedural Fairness' in C Nagy (ed), *The Procedural Aspects of the Application of Competition Law* (Europa Law Publishing 2016).

⁴⁸ ECN, *Results of the questionnaire on the reform of Member States national competition laws after Commission Regulation No. 1/2003* (2008) 7.

⁴⁹ *Ibid.*, 2–8.

⁵⁰ ACM Establishment Act (EAA), arts 12a–12g.

⁵¹ EAA, art 12m.

⁵² Hungarian Competition Act (HCA), sections 55, 55/A, 65, and 65/A(1).

⁵³ HCA, section 64/B(1). See also C Nagy, 'Administrative Competition Procedure and Judicial Review in Hungary' in Nagy (n 47) 192–204.

⁵⁴ This is not the case in Austria, Ireland, Denmark, Finland and Sweden.

⁵⁵ District Court Rotterdam 28 April 2004, ECLI:NL:RBROT:2004:BI3337 (*ETB Vos*).

decide whether it will impose a fine, although ACM's board has the final responsibility and imposes the fine officially.⁵⁶ The investigation and decision-making powers are also separated within the GVH. The decision-making body of the GVH is the Competition Council (CC) which is under the management of one of the Vice Presidents of the GVH who is at the same time the Chair of the CC. The CC is a quasi-judicial body and it decides each case in a three-member (exceptionally five-member) panel designated by the Chair of the CC and its members act with full autonomy. They cannot be given instructions and they are subordinated only to the law. The members of the CC are lawyers or economists (or have both qualifications). There must be at least one economist among the members of the decision panel for every case.⁵⁷

As mentioned above, the possible addressees of the fine vary among the Member States. In the Netherlands, an administrative fine can be imposed on undertaking or groups of undertakings, associations of undertakings and individuals within the undertakings. Although custodial sanctions for individuals are gaining ground in many Member States due to the considered deterrent effects of such sanctions,⁵⁸ the Netherlands decided not to introduce this type of sanction in the Dutch system. In contrast, criminal punishments are applied in Hungary in antitrust cases regarding public procurement and concessional cartels.⁵⁹ In these procedures, it is not the GVH which conducts the investigations but the Public Prosecutor's Office in cooperation with the police, and the criminal court is the decision-making judicial entity.⁶⁰ Natural persons involved in these cartels may face imprisonment of up to five years.⁶¹

In all Member States, the fining decision of the NCA or court can be appealed and reviewed at (another) court. The national competition law systems differ on the types and numbers of court instances, the time limits, the burden of proof and the scope and intensity of judicial review. The relevant factors for judicial accountability will be described in section 3.2.

The NCAs have broad discretion in the decision to investigate a certain case and to

⁵⁶ General Administrative Law Act, art 5:51.

⁵⁷ OECD, *Roundtable on changes in institutional design of competition authorities, note by Hungary* (2014) DAF/COMP/WD(2014)123.

⁵⁸ See Whelan (n 47); K Ost, 'From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need For Further Convergence' (2014) 5 JECLP 125. Imprisonment is for example possible in the UK, Estonia, Ireland and Denmark.

⁵⁹ C Nagy, *Competition Law in Hungary* (Wolters Kluwer 2016) 139.

⁶⁰ Ibid., 145.

⁶¹ Ibid., 140.

impose a fine. Both the ACM and the GVH may set priorities and are not obliged to investigate all alleged violations of competition law. According to Article 70(1) Hungarian Competition Act, the GVH only has the obligation to start an investigation if the protection of the public interest warrants it, but has a margin of appreciation to decide when this requirement is fulfilled. The decision not to investigate a case both in the Netherlands⁶² and in Hungary⁶³ can be appealed in court if the case was started on the basis of a complaint by a third party. The courts only conduct a marginal review in those kinds of cases because of the discretion of the competition authority in these areas.⁶⁴

2.3 Coordination Mechanisms

Regulation 1/2003 envisages mechanisms of close cooperation, regarding information exchange and case allocation, between all competition authorities in the European Union. The ECN (European Competition Network) has been established as a framework for these mechanisms. The rules regarding communications between ECN authorities are laid down in Regulation 1/2003 and in the Network Notice.⁶⁵ From the outset, it was made clear that ‘all competition authorities are independent from one another and that cooperation takes place on the basis of equality, respect and solidarity’, as stated in point 7 of the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities which was adopted along with Regulation 1/2003.

Articles 11, 12, 15 and 16 of Regulation 1/2003 address the parallel enforcement between the Commission and the national authorities. These articles show that, although the objective is equality between the different enforcers, the Commission acts as *primus inter pares* when it comes to the enforcement of Articles 101 and 102 TFEU. According to Article 11(6) of Regulation 1/2003, the initiation by the Commission of proceedings for the adoption of a fining decision relieves the NCAs of their competence to apply Articles 101 and 102 TFEU in the same case. The commitment decision forms an exception, since commitment decisions adopted by the Commission do not affect the power of the NCAs to apply Articles

⁶² District Court Rotterdam 13 August 2015, ECLI:NL:RBROT:2015:5805 (*Brink*); District Court Rotterdam 27 August 2015, ECLI:NL:RBROT:2015:6080 (*Buma/Stemra*); CBb 19 November 2015, ECLI:NL:CBB:2015:401 (*Stichting 't Hollandsch Huys*); CBb 8 oktober 2015, ECLI:NL:CBB:2015:314 (*Chipshol*); CBb 22 December 2015, ECLI:NL:CBB:2015:407 (*VVR*).

⁶³ Nagy (n 59) 194.

⁶⁴ *Ibid.*; District Court Rotterdam 27 August 2015, ECLI:NL:RBROT:2015:6080 (*Buma/Stemra*).

⁶⁵ Network Notice (n 4).

101 and 102 TFEU.⁶⁶ If an NCA is already acting on a case, the Commission can only initiate proceedings after consulting that NCA. Article 11(3), (4) of Regulation 1/2003 obliges NCAs to inform the Commission of cases which have an effect on trade between Member States. This not only provides information about ongoing cases and envisaged decisions, but also gives the Commission the possibility to take over the case under Article 11(6) if it considers it necessary. Article 12 addresses the exchange of substantial information about a case between the different enforcers.

Article 16 of the Regulation is also important for the cooperation between the Commission and the Member State. According to this article, the national courts and competition authorities cannot take a decision regarding Articles 101 or 102 TFEU which would run counter to an earlier decision by the Commission concerning the same agreement or practice.⁶⁷ The national courts must also avoid making decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. Article 16's objective is the uniform application of Articles 101 and 102 TFEU. In addition, the national authorities may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the EU competition rules.⁶⁸ Finally, national courts have to send their judgments regarding Articles 101 and 102 TFEU to the Commission and the Commission may submit written observations to the national courts when the coherent application of Articles 101 and 102 TFEU requires this.⁶⁹

ECN

The rules for cooperation between the Commission and the NCAs and among the NCAs were laid down within the legal framework of the ECN which was also established by Regulation 1/2003. The institutional design of the ECN consists of four different levels. These are organised in the form of annual meetings of the Directors General of the European Competition Authorities, plenary meetings, horizontal working groups and sector-specific

⁶⁶ Reg 1/2003, preamble point 22.

⁶⁷ Case C-344/98 *Masterfood* [2000] ECR I-11369.

⁶⁸ Reg 1/2003, arts 11(5) and 15(1).

⁶⁹ *Ibid.*, art 15(2) and (3). For example, the Commission submitted a written observation to the Slovakian Supreme Court. In its amicus intervention, the Commission expressed its opinion on the parallel application of EU and national competition rules and the possibility to impose fines for abuse. Available at: <http://ec.europa.eu/competition/ecn/brief/03_2013/sk_dot.pdf> and <http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html> accessed 7 November 2016.

subgroups.⁷⁰ The ECN has a quasi-hierarchical structure in which the Commission still retains a central position. While other European regulatory networks emerged as an initiative of the Member States, the ECN was centrally designed and established by the Commission.⁷¹

The two main pillars of the ECN are case allocation and information exchange. The rules for case allocation are laid down in the Network Notice.⁷² Case allocation is based on the general principle of minimising the number of authorities involved in a single investigation; therefore, the competition authority, which opens the proceedings, remains competent to act until the end of the investigation.⁷³ However, reallocation of cases between network members is possible when necessary for the effective enforcement of EU competition rules. In these cases network members try to allocate the case to a single well-placed authority as far as possible.⁷⁴ In order to qualify as well-placed, a ‘material link’ between the infringement and the geographical jurisdiction of the authority in question must exist.⁷⁵ The Commission is well placed to initiate proceedings where the alleged violation affects competition in more than three Member States, or where a case is closely linked to other EU law provisions which may be exclusively or more effectively applied by the Commission, if the Union interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises or to ensure effective enforcement.⁷⁶ In those cases, the Commission can take over a case from the NCA. However,

⁷⁰ The Director General’s meeting is the forum for discussing major policy issues such as the review of the Commission’s policy on art 102, the ECN leniency model programme, increases in food and energy prices and the financial crisis. The ECN Plenary discusses horizontal issues of common interest policy such as the ability of national competition authorities to disapply state measures in their application of the EU competition rules. Under the ECN Plenary forum several working groups operate that deal with horizontal issues of a legal, economic or procedural nature situated at the interface between EU law and the different national laws. The ECN’s working group on cooperation issues and due process follows up on the state of convergence of enforcement procedures in the different Member States. The sectoral subgroups deal with issues from specific sectors such as energy, food, banking and payments. The working groups are created by the NCAs as their needs dictate; they are composed of expert officials from the NCAs and the Commission and they share views and best practices.

⁷¹ For example, the European Electricity Regulation Forum and the European Gas Regulation Forum were established as informal fora of sectoral public and private actors, which met infrequently and had no formal powers or organisation. Later, informal groups of national independent regulatory authorities were established, like the Independent Regulators Group (IRG) for telecommunications or the Forum of European Securities and the Council of European Energy Regulators (CEER) that were networks set up by national regulatory authorities. D Coen and M Thatcher, ‘Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies’ (2008) 28 JPP 49.

⁷² Network Notice (n 4).

⁷³ Ibid., point 6.

⁷⁴ Ibid., point 7.

⁷⁵ Ibid., point 8.

⁷⁶ Ibid., points 14–15.

the Commission cannot take over a case merely for reasons of coherent application.⁷⁷ Despite the foregoing, there are recent examples where the NCAs and the Commission have found it more efficient to allocate different aspects of the same case to different authorities or to parallel enforcement of one case by multiple NCAs, which is not prohibited by Regulation 1/2003.⁷⁸

Information exchange concerns both information exchange on ongoing cases and information exchange on best enforcement practices. The NCAs and the Commission may also exchange confidential information; however, there are certain safeguards to such information exchange protecting the rights of defence.⁷⁹ The NCAs and the Commission may also assist one another in collection of evidence. While NCAs enjoy a certain degree of discretion as to whether or not to assist another NCA, they are obliged to do so with regard to the Commission.⁸⁰ While there are no mechanisms for dispute resolution, the Advisory Committee provides a platform for resolving possible disputes.⁸¹ The Commission is obliged to consult the Advisory Committee before taking a positive decision on Articles 101 and 102 TFEU and discussions between the Commission and the Advisory Committee may result in written opinions that the Commission has to take into account.⁸²

Although case allocation and information sharing are the main pillars of the ECN, few cases have been reallocated⁸³ and sharing information about specific cases has been infrequent.⁸⁴ Hence, shared enforcement between the Commission and Member States is very limited. The ECN, in fact, functions more as a forum to discuss enforcement strategies as well as for mutual learning and informal information sharing.

Further details and logistical aspects of the cooperation are not determined by the Network Notice but by respective national procedural laws so far as they comply with the principles of effectiveness and equivalence.⁸⁵ In sum, the ECN does not have any

⁷⁷ European Commission (n 39).

⁷⁸ Case T-64/12 *Henkel AG* [2013] OJ C129/20; Case T-128/11 *LG Display* [2011] OJ C130/1; Case T-402/13 *Orange* [2013] OJ C313/28; Nazzini (n 3), 275; Whelan (n 47).

⁷⁹ Reg 1/2003, art 12; Network Notice (n 4) point 28.

⁸⁰ *Ibid.*, arts 22(1) and 21(2).

⁸¹ *Ibid.*, art 14.

⁸² *Ibid.*, art 14(1) and (5).

⁸³ Commission (n 39) final points 214–224. Interestingly, there is much less information provided specifically on case allocation in the report that has been published after ten years. Commission (n 30) points 237–245.

⁸⁴ G Monti, ‘Independence, Interdependence and Legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network’ (2014) EUI Working Paper Law.

⁸⁵ F Cengiz, *An Academic View on the Role and Powers of National Competition Authorities* (European Parliament 2016), available at <<http://www.europarl.europa.eu/p.13>> accessed 11

autonomous enforcement powers or competences; only the NCAs and the Commission possess the powers and competences to apply and enforce the law.

The ECN has so far been functioning smoothly and successfully,⁸⁶ and it has been praised as an effective ‘joint enterprise’ between the Member States and the Commission. However, in practice the Commission still retains a privileged position. It acts as the ‘network manager’ with an important capacity for monitoring and oversight.⁸⁷ Legally, the ECN is not an official EU institution, and it does not have any legal personality, as a consequence of which this cooperation is not subject to EU or national judicial control. This will be further analysed in section 3.

2.4 Interim Conclusion

The above analysis clearly shows that the enforcement of EU competition law is in fact based more on parallel enforcement and less on shared enforcement in the true sense of the word. This also means that basically once case allocation has taken place the competent and best-placed competition authority, either one of the 28 NCAs or the Commission, will deal with the case on a stand-alone basis. Moreover, while decentralisation was originally based on the concept of equality among enforcers, the factors mentioned above confirm the Commission’s position as *primus inter pares* in this enforcement framework. The ECN as such does not have its own powers of enforcement and functions more as a forum for policy making.

3. Accountability

The bifurcated nature of the shared enforcement of EU competition law as analysed above and, more specifically, the way in which the ECN functions, raise the fundamental question of how the actors in the shared enforcement of EU competition law can be held accountable for their actions. The question of accountability is even more important in regard to the fact that the Commission has an influential role in the enforcement of competition law. The Commission performs an important and highly discretionary role in clarifying the EU

November 2016.

⁸⁶ European Commission (n 39) 574; European Commission (n 30); H Kassim and K Wright, ‘The European Competition Network: a European Regulatory Network with a Difference’ (2010), available via <<http://regulation.upf.edu/dublin-10-papers/2E3.pdf>> accessed 6 November 2016; Y Svetiev, ‘Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?’ in C Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010).

⁸⁷ Cengiz (n 85).

competition rules and in ensuring consistent application of these rules. The Commission drafts numerous soft law documents, such as notices and guidelines, which explain its enforcement and provide guidance for undertakings. These instruments are not legally binding.⁸⁸ Nonetheless, they have an important influence on the way competition rules are enforced at both the EU and national level. The Dutch courts, for example, regularly refer to the Commission's policy documents in their judgments.⁸⁹ Another illustration is the GVH's present guidelines for the setting of fines, which largely follow the guidelines of the European Commission and give consideration to factors including gravity and duration in the calculation of fines. In conclusion, the democratic legitimacy of these soft law instruments is questionable and it directly affects the enforcement agenda of the Commission as well as of the NCAs. This is worrying as it does shape the substance of EU competition law but without having a proper political accountability forum.⁹⁰

3.1 Political Accountability

Under Article 17 (6) TEU the European Parliament (EP) has the competence to hold the Commission politically accountable. The EP has a number of important mechanisms at its disposal to this function such as Article 17(7) TEU that defines the strong political connection between the composition of the Commission and the EP.⁹¹ Under Article 201 TFEU, the EP can censure the Commission and ultimately dismiss it and the EP has the power to set up a temporary Committee of Inquiry to investigate 'alleged contraventions or maladministration in the implementation of Union law' according to Article 226 TFEU.

According to Articles 285–287 TFEU, the European Court of Auditors (ECA) as the EU's independent external auditor, holds the Commission to account through checking if the budget of the EU has been implemented correctly, and that EU funds have been raised and spent legally and in accordance with the principles of sound financial management (see Chapter 12). The annual reports of the ECA in the last six years mainly focused on

⁸⁸ Case C-360/09 *Pfleiderer* [2011] ECR I-05161, para 21; Case C-226/11 *Expedia* [2012] ECLI:EU:C:2012:795.

⁸⁹ The same is true for the Commission's decisions. See on this topic A Gerbrandy, *Convergentie in het mededingingsrecht* (Den Haag: BJU 2009).

⁹⁰ O Ştefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 *European Law Journal* 753.

⁹¹ The President and the members of the Commission must be approved by the Members of the EP. Article 17(7) TEU also describes the procedure for the appointment of the President of the Commission as well as the Commissioners. Commission officials can be removed according to the procedures laid down in arts 245 and 247 TFEU.

procurement rules and state aid rules,⁹² and do not mention the work done within the ECN.

By virtue of Article 233 TFEU the Commission and thus DG Competition submits its annual reports to the EP, who consequently discusses it and comments on the report in a resolution.

Relations between the EP and the Commission have since 1990 been governed by a Framework Agreement, which is updated every five years. In 2010, the EP and the Commission concluded the current Framework Agreement, which defines the procedures for their political collaboration.⁹³ The Framework Agreement, among others, provides for the organisation of regular meetings between representatives of the two institutions.⁹⁴

Despite the foregoing, the EP has limited legislative and supervisory powers in competition law in comparison with other policies connected to the internal market and the Commission is independent and enjoys a high degree of discretion concerning policy making.⁹⁵ Competition law and policy is the only exclusive Union competence in which the Parliament's legislative power is limited to consultation (arts 3 and 103 TFEU).⁹⁶

While in principle the EP can hold the Commission accountable for its policy choices, effective accountability often proves to be difficult in practice among others, due to information asymmetry between the two institutions.⁹⁷ Due to the technical complexity of competition law the Commission functions as a technocratic expert and as such enjoys a high degree of independence.⁹⁸

A discursive analysis of the EP's reports, debates and resolutions concerning the

⁹²The annual reports are available at <<http://www.eca.europa.eu/en/Pages/AuditReportsOpinions.aspx?ty=Annual%20Report&tab=tab2>>.

⁹³ Framework Agreement on Relations between the European Parliament and the European Commission, Cooperation between the European Parliament and the European Commission available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Aai0041>> accessed 8 December 2016.

⁹⁴ These meetings may which may, for example, bring together the college of commissioners and the chairs of the parliamentary committees. Moreover, on the basis of this Framework Agreement, the EP and the Commission have also embarked on examining carefully any request made by either institution. In addition, the Commission commits to guaranteeing the Parliament access to its meetings and documents relating to legislative and budgetary procedures.

⁹⁵ Article 17(3) TEU states that the Commission shall be completely independent in carrying out its responsibilities and that it shall neither seek nor take instructions from any government or other institution, body, office or entity.

⁹⁶ In fact, the Parliament participates in competition debates primarily through the Economic and Monetary Affairs Committee that takes the lead in legislative and accountability activities in this field. F Cengiz, 'Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach' (2016) 54 JCMS 826, 828 and 836.

⁹⁷ F Cengiz, 'Multi-level Governance in Competition Policy: the European Competition Network' (2010) 35 ELR 627.

⁹⁸ Ibid., 827.

Commission's annual reports on competition policy between 2003 and 2015 clearly reflect the EP's increasing rhetoric for more transparency in the work of the Commission and for a more proactive role for the EP in the development of competition policy. The EP has repeatedly called for the extension of the co-decision procedure⁹⁹ so that the EP would have co-legislative role. It has also voiced the requirement that the EP be regularly informed about any initiative in the shaping of competition policy as such an involvement would create greater transparency and legitimacy in EU competition policy. It has also urged the Commission to report to Parliament in detail and annually about the follow-up to Parliament's recommendations, and explain any departure from Parliament's recommendations.¹⁰⁰

The actual effect of this discourse has, however, been questioned by one MEP in a debate in 2011:

It strikes me about these annual debates on competition policy that there is a very friendly and polite exchange of views, and then the Commission just carries on with business as usual because the Commission has the exclusive powers in this area. I think, at a time where we are discussing economic governance for the European Union, that should change. The European Parliament should have a much bigger role in shaping competition policies, and I therefore urge the Commission to follow, in particular, recommendations 3 and 4, and really seriously report back to the European Parliament about its recommendations.¹⁰¹

Perhaps as a result of the EP's dissatisfaction with the Commission's policy following its recommendations, a certain strengthening of the above rhetoric can be witnessed in the last three years, for example, by opening separate chapters in the EP resolutions on the role of

⁹⁹ EP Resolution on the Commission's XXXIIIrd Report on Competition Policy 2003 (2004/2139(INI)); EP Resolution on the Commission Report on Competition Policy 2004 (2005/2209(INI)); EP Resolution of 19 June 2007 on the Report on Competition Policy 2005 (2007/2078(INI)).

¹⁰⁰ It has also called on the Commission to make publicly available all evaluations and studies referred to in its future annual competition reports and to make use of independent and reliable expertise for those evaluations and studies. EP resolution of 9 March 2010 on the Report on Competition Policy 2008 (2009/2173(INI)); In its 2011 resolution the EP even argued that notes that the response by the Commission to Parliament's 2008 Competition Report is a mere summary of actions taken and does not provide any insight into the effectiveness of the measures. EP resolution of 20 January 2011 on the Report on Competition Policy 2009 (2010/2137(INI)), point 14.

¹⁰¹ Sophia in 't Veld, on behalf of the ALDE Group. Report on competition policy 2009 (debate) European Parliament resolution of 20 January 2011 on the Report on Competition Policy 2009 (210/2137(INI)).

the EP¹⁰² and separately discussing issues of legitimacy and accountability. In 2015, the EP even argued that the EP's lack of co-decision powers in competition policy and its mere consultation under Articles 103 and 109 TFEU is a democratic deficit that cannot be tolerated and proposed to overcome this deficit through inter-institutional arrangements and correction in the next Treaty change.¹⁰³ The EP has squarely put forward that the Commission must be fully accountable and must follow up Parliament's resolutions and cooperate to reinforce the ongoing structured dialogue. It called on the Commissioner to commit to frequent meetings with the relevant committee(s) of Parliament.

The latest EP resolution of 2016 even incorporated a chapter with the title 'Democratic strengthening of competition policy', where the EP argued that while the current dialogue between Parliament and the EU competition authority had taken place on a regular basis, it should be stepped up, in particular for the purpose of assessing and acting on the calls made by Parliament in previous years. It argued that while the independence of the Commission's DG Competition is of the utmost importance if it is to achieve its goals in a successful manner, the right to a hearing on essential matters of principle is not sufficient and called again for fundamental legislative directives and guidelines to be adopted within the co-decision procedure.¹⁰⁴ It further emphasised that, in its future work, the Commission's DG Competition should take proper account of the standpoints adopted by Parliament in past reports on competition policy.

As this area of Union policy has not been strengthened in its democratic dimension in recent Treaty amendments, it called on the Commission to put forward proposals for a corresponding amendment to the Treaties to extend the scope of the ordinary legislative procedure to cover competition law as well.¹⁰⁵

The NCAs can be held accountable by their national parliaments for their EU competition law enforcement. The scope of accountability and the procedures for accountability are largely determined by country-specific legislation and the respective legal traditions. Even the newly proposed Directive (Article 4) does not add a substantive provision on this and merely says that Member States should subject their NCAs to proportionate

¹⁰² Highlighted the essential role of the European Parliament in representing the interests of European consumers in the proper enforcement of competition rules; EP resolution of 10 March 2015 on the Annual Report on EU Competition Policy (2014/2158(INI)), point 100.

¹⁰³ EP resolution of 10 March 2015 on the Annual Report on EU Competition Policy (2014/2158(INI)).

¹⁰⁴ European Parliament resolution of 19 January 2016 on the Annual report on EU Competition Policy (2015/2140(INI)), points 106–114.

¹⁰⁵ Ibid.

accountability requirements without defining further details of what these are. The accompanying text does however indicate that ‘proportionate accountability requirements include the publication by NCAs of periodic reports on their activities to a governmental or parliamentary body. NCAs may also be subject to control or monitoring of their financial expenditure, provided this does not affect their independence.’¹⁰⁶

Political accountability of the NCAs should be analysed together with the institutional, personal and financial independence, both *de facto* and *de iure*¹⁰⁷ of the competition authority which largely differs across Member States.¹⁰⁸

While the Dutch ACM is an independent administrative authority, the Minister of Economic Affairs is responsible for the ACM towards the Dutch Parliament.¹⁰⁹ According to the law, the Dutch Parliament does not have a direct relationship with the ACM. The Minister and Parliament have however several institutional, personal and financial mechanisms to monitor the functioning of the ACM.

First, the ACM has information obligations towards the Minister of Economic Affairs and the responsible Minister vis-à-vis the Parliament. For example, the ACM has to send its annual reports, which include policy choices, enforcement activities and costs, to the Minister.¹¹⁰ The Minister sends the annual report together with his or her findings to the Parliament.¹¹¹ The Parliament can and did multiple times question the Minister on the annual report. In 2016, Members of Parliament questioned the Minister on how the ACM uses its powers, which economic theories it applies and about certain policy choices.¹¹² In addition, the ACM has a general information obligation towards the Minister at the Minister’s request.¹¹³ The Parliament can also question the Minister about the functioning of the ACM. Finally, the Parliament can ask the Minister to evaluate the ACM’s functioning by an external consultancy firm.¹¹⁴

In practice, when the Parliament questions the Minister about the ACM, the Minister

¹⁰⁶ Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM (2017)0142 final, 23.

¹⁰⁷ S Lavrijssen and A Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (2012) 39 LIEI 419.

¹⁰⁸ Guidi (n 36).

¹⁰⁹ Framework Independent Administrative Authorities (FIAA), art 1.

¹¹⁰ FIAA, art 18; EEA, art 6.

¹¹¹ Ibid.

¹¹² Parliamentary Papers II 2015/16, 158494.01u, 674.

¹¹³ FIAA, art 20.

¹¹⁴ Annual report ACM 2015, 8, 10–11. Other studies took place, for example, in 2010 and 2012.

can be accompanied by an ACM representative.¹¹⁵ In this way the ACM can directly explain its work to the Dutch Parliament. The ACM does so in hearings, roundtable meetings or technical briefings, for example, organised by the various parliamentary committees.¹¹⁶ In the Dutch parliamentary debates on the ACM's annual reports the ECN has not been mentioned and no questions were asked about the ACM's work within the ECN.

A recent example of a case in which the ACM directly explained its work to the Dutch parliament is 'the Chicken of Tomorrow' case.¹¹⁷ 'The Chicken of Tomorrow' is an agreement between supermarkets, producers and processors to replace the regularly produced chicken meat by the so-called Chicken of Tomorrow, which is meat from chickens which have had better living conditions. The ACM concluded that these agreements restrict competition.¹¹⁸ ACM's analysis and the economic theory used, led to parliamentary questions, which gave ACM's Chairman the chance to explain ACM's analysis in a roundtable meeting organised by the responsible standing committee of the Parliament on 4 April 2015. The responsible Minister and Secretary of State spoke out publicly that they hoped that ACM would reconsider its analysis.¹¹⁹ The ACM did, however, not fulfil this request. The Minister lacks the power to force the ACM to do so since the law prohibits him from interfering with individual cases which forms an important safeguard protecting ACM's independence in individual cases.¹²⁰ The supermarkets, producers and processors finally withdrew their initiative.

Secondly, regarding financial mechanisms, the ACM sends a draft budget to the Minister every year which the Minister establishes.¹²¹ The idea to give the ACM legal personality which would limit the Minister's influence on the budget by giving the ACM the competence to ascertain its own budget and give the Minister only the competence to approve it was rejected by Parliament.¹²² The Minister argued that the limitation of his competence would be undesirable with regards to his accountability towards the Parliament.¹²³ Literature has criticised the rejection in light of ACM's financial independence.¹²⁴

¹¹⁵ Ibid., 13–14.

¹¹⁶ Ibid., 13; Another example is the roundtable meeting about the mergers in the health care sector.

¹¹⁷ Analysis ACM, ACM/DM/2014/206028.

¹¹⁸ Annual report 2015, 14.

¹¹⁹ Reaction Minister Kamp and Secretary of State Dijkema 19 March 2015.

¹²⁰ EEA, art 9.

¹²¹ FIAA, art 25.

¹²² Parliamentary Papers II 2011/12, 33186, 3, 6–7. See for more information L Schouten and A de Moor-van Vugt, 'De onafhankelijkheid van de Autoriteit Consument en Markt' (2015) 63 SEW 62.

¹²³ Parliamentary Papers I 2012/13, 33186, D, 15.

¹²⁴ Schouten and De Moor-van Vugt (n 123) 69.

Thirdly, the Minister is involved in appointing the ACM's board, although the board operates independently in practice.¹²⁵ The Minister has limited competence to dismiss one of the board members for, among others reasons, incompetence.¹²⁶ ACM's staff is employed by the Ministry of Economic Affairs, while, in practice, the ACM hires the employees.¹²⁷ To guarantee independence, Article 9 EAA states that the board and employees of the ACM cannot receive any orders regarding individual cases from the responsible Minister.

In addition to abovementioned factors, three interesting factors influence ACM's decision-making process in individual cases. The first factor is certain targets set for fines that were adopted in the coalition agreement of the previous Dutch Government.¹²⁸ These fining targets describe the amount of fines (in Euros) to be imposed by the ACM for cartel infringements.¹²⁹ Many academics criticised these fining targets since they influence ACM's discretion in the enforcement of individual cases.¹³⁰ The targets for example influence the ACM's competence to set priorities which also includes the decision to not impose a fine or to use alternative enforcement instruments and the competence to set the amount of the fine. In other words, it negatively affects independent enforcement by the ACM. When Parliament questioned the competent Minister about these targets, he argued that the targets do not interfere with the independence of the ACM, since if the ACM does not achieve the desired targets, this will not affect its budget or have any other consequences.¹³¹ Another factor which influences the amount of the fines in individual cases is the fact that the guidelines that the ACM has to follow in its enforcement of competition law, for example as to the calculation of any fines, are drafted by the responsible Minister, restricting ACM's discretion.¹³² Finally, the Minister has the competence to annul an *ultra vires* decision of the ACM.¹³³

In conclusion, while the ACM is an independent authority, the Minister and Parliament have various instruments to receive information from the ACM and discuss issues with the latter. The asymmetries in knowledge and expertise between on the one hand the ACM, and on the other hand the Minister, Government and Parliament can make the

¹²⁵ EAA, art 3(3).

¹²⁶ FIAA, art 12(2).

¹²⁷ EEA, art 5; Schouten and De Moor-van Vugt (n 123) and literature mentioned there.

¹²⁸ Coalition agreement VVD-PvdA 29 October 2012, *Bruggen slaan* 69–71, available at <www.rijksoverheid.nl> accessed 25 November 2016.

¹²⁹ The target was 75 million for the year 2014, 100 million for 2015 and 125 million for 2017.

¹³⁰ Schouten and De Moor-van Vugt (n 123) 69–70 and literature mentioned there.

¹³¹ Ibid.; Parliamentary Papers I 2012/2013, 33186, F, 11.

¹³² Schouten and de Moor-van Vugt (n 123) 73; FIAA, art 21.

¹³³ EAA, art 10(1).

information exchange and discussion thereof difficult in practice. Instruments to influence the enforcement by the ACM are the appointment of ACM's board, ascertaining ACM's budget and fining targets, drafting ACM's guidelines and the possibility of annulment of *ultra vires* decisions. Although in particular fining targets and guidelines limit ACM's discretion of handling cases, the non-interference in individual cases should be safeguarded as also described in law. *De facto*, as illustrated by the Chicken of Tomorrow case, the ACM is willing to explain and give information about its analysis in individual cases, but will protect its monopoly to make decisions. These factors indicate a certain balance between the Minister and the ACM in practice and in spite of their relationship of dependence a *de facto* independence of the ACM in individual cases.

The Hungarian GVH is a budgetary institution and is independent from the Government: it cannot be given instructions by any governmental institution but only by law.¹³⁴ The President of the GVH is nominated by the Prime Minister, heard by the Hungarian Parliament and is appointed by the President of Hungary. The appointment lasts for six years (renewable) and this overlaps with the four-year period of the Government. The President of the GVH cannot be dismissed except in specific and very serious circumstances, such as for committing a crime or misusing information certified as top secret. The operation and financial management of the GVH is completely autonomous and constitutes a separate chapter in the central budget. In contrast to the ACM, the GVH is held accountable to the Hungarian Parliament. As mentioned above, its President is heard by the Parliament before his or her appointment. Moreover, the GVH submits its annual reports to the Parliament and, on request, to the competent parliamentary committee on the activities of the GVH. In addition, according to the Hungarian Competition Act, the GVH has to publish the non-confidential versions of all of its decisions and all of its final orders adopted at the conclusion of proceedings (the opening of which were made also public). Finally, the National Audit Office controls how the GVH uses its financial resources.

Our analysis of the Hungarian parliamentary debates on the GVH's annual reports in the period 2004–16 reveals a serious 'backsliding'¹³⁵ of the accountability mechanisms laid down in Hungarian law. The GVH has been publishing and submitting its annual reports ever since its creation in 1991 to the Hungarian Parliament,¹³⁶ where various Committees such as

¹³⁴ OECD (n 57).

¹³⁵ See K. Scheppele, Testimony at the Helsinki Commission Hearing on Hungary: <<https://hungarianspectrum.wordpress.com/2013/03/19/kim-lane-scheppeles-testimony-at-the-helsinki-commission-hearing-on-hungary-full-text/>> accessed 8 December 2016.

¹³⁶ See annual reports in English: <http://www.gvh.hu/gvh/orszaggyulesi_beszamolok> accessed 8

the Economic and Consumer Protection Committees have pre-discussed and commented on the reports and the Parliament has held general debates with the participation of the representative of various parties. The GVH's work has been praised and appreciated by the MEPS (both government and opposition parties) and they voiced their satisfaction about the transparency and accuracy with which the GVH worked and communicated its work to the outside world.¹³⁷ In these debates the ECN has been mentioned twice and the MEPs voiced their hope that the GVH's work would become more efficient through its participation in the network.¹³⁸

However, when the new President of the GVH was appointed by Government in 2010, he was not heard by the Parliament before his appointment.¹³⁹ What is even more worrying since 2010 on the one hand, is the fact that a number of areas were excluded from the GVH's competence to enforce the competition rules. This is a direct consequence of a change that has been analysed as a shift to a new constitutional culture in Hungary, where the law is used to enable the Government to rule and not the rule of law functioning as a restraint on Government actions. This shift was perhaps the most visible in practices of economic regulation and their constitutional review in Hungary of the new Fundamental Law.¹⁴⁰ Since 2010 the Hungarian Government has radically restructured numerous, well-identifiable sectors of the Hungarian economy such as gambling, food and tobacco retail and public utilities sector.¹⁴¹ These restructuring processes were characterised by a low degree of transparency and a high degree of executive discretion. Moreover, in its assessment of these developments, the Hungarian Constitutional Court refused to test Government actions against the most fundamental requirements of the rule of law.¹⁴²

December 2016.

¹³⁷ See Parliamentary debates on the GVH's Annual reports, J/15947 A Gazdasági Versenyhivatal 2004. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról, J/5632 A Gazdasági Versenyhivatal 2007. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról, J/2541 A Gazdasági Versenyhivatal 2006. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról, J/227 A Gazdasági Versenyhivatal 2005. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról.

¹³⁸ Parliamentary debates on the GVH's Annual reports, 2005, 2006 J/2541; J/227

¹³⁹ Az Országgyűlés hiteles jegyzőkönyve 2010. évi őszi ülészakasza október 11-12-ei ülésének második ülésnapja, 34.szám, point 5166

¹⁴⁰ N Chronowski and M Varjú, 'Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law' (2016) 8 Hague J Rule Law 282.

¹⁴¹ Ibid.

¹⁴² Ibid. See for example Decision 3062/2012 of the Constitutional Court; Decision IV/03567/2012 of the Constitutional Court.

On the other hand, the general parliamentary debate as an accountability forum has disappeared. The GVH's 2012 and 2014 and 2015 annual reports were merely discussed by one single parliamentary committee.¹⁴³ This has serious implications for the rule of law institutions and values in Hungary, but it may equally impact the enforcement of EU competition law.

Unlike its network members, the ECN itself cannot be held accountable either to the EP or the national parliaments. It is only its members that are accountable to their respective parliaments, but even in that case not for acts or decisions taken within the ECN e.g. case allocation and information exchange. Unlike other EU networks, for example for telecommunications, the ECN is under no obligation to publish annual reports and submit them to the Commission or the EP. Information on and about the work of the ECN is provided through the Commission's annual report and through its website where the ECN publishes a newsletter.¹⁴⁴

The abovementioned analysis of the EP's debates and resolutions on the Commission annual reports reflect a very low level of accountability concerning the ECN. In fact, the EP from 2004 on took a positive view of cooperation within the ECN concerning its goal to ensure the EU-wide effectiveness and coherence of competition policies and it has supported the effective sharing of responsibility between the ECN members,¹⁴⁵ arguing that it allows EU-wide coherence of public enforcement of competition rules, and encourages its further development.¹⁴⁶ The EP pointed out that the ECN is a cooperation forum and is essential for the strengthening of the consistency and effectiveness of the application of the EC competition rules, and urges its members to play an active part in that body and to provide impetus for its potential in accordance with the strategic role given to competition policy in the EU.¹⁴⁷ It has even congratulated the Commission on the steps it has taken in improving the functioning of the ECN.¹⁴⁸

The EP merely called the Commission to take measures to optimise the exchange of

¹⁴³ J e g y z ő k ö n y v az Országgyűlés Gazdasági bizottságának 2016. március 22-én, kedden 9 óra 34 perckor az Országház főemelet 37. számú tanácstermében megtartott üléséről, 5-12. J e g y z ő k ö n y v az Országgyűlés Gazdasági bizottságának 2016. szeptember 20-án, szerdán 9 óra 04 perckor az Országház főemelet 37. számú tanácstermében megtartott üléséről, 6-23.

¹⁴⁴ See <<https://webgate.ec.europa.eu/multisite/ecn-brief/en/brief/editorial>> accessed 8 December 2016.

¹⁴⁵ EP Resolution of 12 June 2013 on the Annual Report on EU Competition Policy (2012/2306(INI)).

¹⁴⁶ EP Resolution of 10 March 2015 on the Annual Report on EU Competition Policy (2014/2158(INI)).

¹⁴⁷ EP Resolution of 20 March 2006 on the Commission Report on Competition Policy 2004 (2005/2209(INI)).

¹⁴⁸ EP resolution of 19 June 2007 on the Report on Competition Policy 2005 (2007/2078(INI)).

information among NCAs within the ECN, and to enhance the quality of such information, with a view to guaranteeing the uniform application of EU competition policy; and to make an effort to promote the correct application of the competition rules in all Member States, and to intervene in good time where the competition rules are being applied unsatisfactorily or in a discriminatory manner.¹⁴⁹ While the EP has clearly voiced its concerns regarding the transparency and accountability of the Commission for its work the same concern has not been voiced with regard to the ECN. This is surprising in light of the fact that the introduction of network governance in general¹⁵⁰ and in particular in EU competition law¹⁵¹ has been extensively analysed. This analysis clearly demonstrates that networks provide flexibility by enabling cooperation among national and Union experts and officials in order to address a policy issue but at the same time they carry the risk of producing technical discourses and policies that lack the democratic input of citizens and therefore are hazardous to accountability forums such as courts and parliaments.¹⁵²

Solutions for the above sketched accountability problem in the field of EU competition law is scarce. Cengiz argued that multi-level deliberative networks and mini-publics can directly participate in multi-level policy-making processes and thus remedy the accountability deficit present in the network.¹⁵³

De Visser suggested that the ECN should also draw up its own annual work programme and submit it directly to the EP.¹⁵⁴ She also suggested that the law could provide for a periodic review of the ECN's functioning supplemented by deliberation at the accountability forum. While parliaments and courts are the traditional forums of accountability, external administrative institutions of accountability have recently emerged in the form of ombudsmen and audit offices. Similarly, Harlow and Rawlings suggested that 'networks of accountability' be constructed in order to cover the accountability gap in supranational networks like the ECN. These would be built up from traditional accountability machinery such as courts, parliaments and more recent ones such as ombudsmen and audit

¹⁴⁹ EP Resolution of 20 March 2006 on the Commission Report on Competition Policy 2004 (2005/2209(INI)).

¹⁵⁰ Coen and Thatcher (n 71).

¹⁵¹ Cengiz (n 96).

¹⁵² Ibid.

¹⁵³ See also: R Goodin and J Dryzek, 'Making Use of Mini-Publics' in R Goodin (ed.), *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn* (OUP 2008).

¹⁵⁴ It is, however, not clear whether the obligation to report directly to the Parliament would only be possible if the ECN were to have legal personality like an agency. This may raise additional legal issues. M de Visser, *Network-based Governance in Commission Law – The Example of Commission Competition and Commission Communications Law* (Hart Publishing 2009) 265.

offices.¹⁵⁵

The above analysis shows that political accountability merely exists at the level of the members of the ECN and the ECN itself is not held accountable. What is more, the accountability forums as established at EU and national level fail to even question either the Commission or the respective NCAs on their work within the ECN. On the basis of our case studies and concerning the Commission we think that the EU and national parliaments may simply lack adequate information about the work of the ECN and therefore, may not be aware of the existing accountability gap. Both the Commission and the NCAs have a knowledge advantage vis-à-vis their national parliaments. Moreover, there is a risk that the NCAs hide behind the European Commission and the general EU law principle of sincere cooperation and justify their work in the ECN and state that they need to follow certain policies choices to serve the uniform enforcement of EU competition law.

3.2 Judicial Accountability

As far as the judicial accountability of the Commission is concerned, the undertaking can file an appeal at the General Court as the first instance court and the CJEU as the second instance court.¹⁵⁶ The General Court reviews questions of facts and law, but the CJEU's review is limited to questions of law.¹⁵⁷ According to Article 31 Regulation 1/2003, the EU Courts may cancel, reduce or increase the fines. The standard of the review by the EU Courts varies from an intensive review regarding, among others, the establishment of the facts and the interpretation of the law,¹⁵⁸ to a marginal review on areas in which the Commission has discretion, such as policy matters and complex economic assessment.¹⁵⁹ The intensity of the judicial review on the point of complex economic analysis has been extensively discussed in the legal literature.¹⁶⁰ Lavrijssen and De Visser's analysis on the intensity of review pictured it as a sliding scale ranging from the extremely marginal review on the one hand to a very

¹⁵⁵ C Harlow and R Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) ELJ 542.

¹⁵⁶ TFEU, art 263.

¹⁵⁷ TFEU, art 263; Reg 1/2003, art 31.

¹⁵⁸ Case C-386/10 *Chalkor v Commission* [2011] ECR I-13085.

¹⁵⁹ A Kalintiri, 'What's in a Name? The Marginal Standard of Review of 'complex economic assessments' in EU competition Enforcement' (2016) CMLR 1283.

¹⁶⁰ E.g. D Gerard, 'EU Cartel Law and the Shaking Foundations of Judicial Review' (2010). Available at SSRN: <<https://ssrn.com/abstract=1675451>>; W Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2009). Available at SSRN: <<https://ssrn.com/abstract=1492736>>. In contrast see Kalintiri, *ibid*.

intensive review on the other hand.¹⁶¹ The form and intensity of judicial reviews is even more relevant in light of the increasing use of settlements and commitment decisions that greatly influence judicial accountability. The Commission has settled in almost 70 per cent of cases since 2010.¹⁶² The use of settlements by the Commission or the NCAs plays an important role in relation to judicial accountability. Research by Hellwig et al. showed that the use of settlements lowers the percentage of litigation.¹⁶³ The percentage of litigation is around 60 per cent for average cartel cases, while the undertakings filed appeals in only 10.5 per cent of the settled cases.¹⁶⁴ In addition, the grounds of appeal are limited since the undertaking among others has already acknowledged the facts and the qualification of them and has accepted the amount of the fine.¹⁶⁵

These changes resulted on the one hand in more efficiency and flexibility in the Commission's enforcement (e.g. more frequent use of settlements and commitment decisions) but, on the other hand, they have moved the administrative enforcement system of the EU towards a regulatory enforcement system through giving more discretion to the Commission and reducing the room for judicial review and accountability before the EU Courts.

The level of judicial protection differs greatly across the Member States. This is the result of their procedural autonomy, which allows for differences in the type and number of courts, expertise of the judiciary, burden and standard of proof during court procedures, and time limits. These factors influence the level of judicial protection. The fining decision of the ACM can be appealed by the undertaking fined at two different levels of exclusive competent courts which both review questions of law and facts.¹⁶⁶ Both courts conduct an intensive

¹⁶¹ S Lavrijssen and M de Visser, 'Independent Administrative Authorities and the Standard of Judicial Review' (2006) *Utrecht Law Review* 111.

¹⁶² See M Hellwig, K Hüschelrath and U Laitenberger, 'Settlements and Appeals in the European Commission's Cartel Cases: An Empirical Assessment' (2016). Available via: <<http://ssrn.com/abstract=2731073>>. See for the Dutch practice of settlements: A Outhuijse, 'Schikken met de ACM: gewenste koers of rechtsomkeerd' (2016) *SEW* 12..

¹⁶³ Hellwig et al., *ibid*.

¹⁶⁴ *Ibid*.

¹⁶⁵ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases 2008/C 167/01.

¹⁶⁶ A Outhuijse, 'Effective Public Enforcement of the Cartel Prohibition in the Netherlands: a Comparison of ACM Fining Decisions, District Court Judgments, and TIAT Judgments' in C Rusu and others (eds), *Boosting the Enforcement of EU Competition Law at Domestic Level* (Cambridge Scholars 2017); A Outhuijse and J Jans, 'Judicial Review of Decisions of the Dutch Competition Authority' in W Devroe and others (eds), *Mundi et Europae civis; Liber Amicorum Jacques Steenbergen* (Larcier 2014) 265. Available at SSRN: <<http://ssrn.com/abstract=2506621>>.

review of all aspects of the fining decisions.¹⁶⁷ The Dutch level of judicial protection can thus be considered as high, as a consequence of the full review of questions of law and fact by the two specialised courts, and the fact that the ACM bears the burden of proof. The ACM fining decisions for cartel cases are also often annulled by those courts.¹⁶⁸ In the case of an annulment, the Dutch court has the obligation to rule independently whether a fine can be imposed and what the amount of the fine should be.¹⁶⁹

Decisions of the GVH are subject to judicial review at three different levels of courts that all review questions of law and facts. The final court is the Hungarian Supreme Court, and ultimately, after those three court procedures, the parties may file a constitutional complaint with the Hungarian Constitutional Court. The standard of review in administrative procedural law is that of 'legality'.¹⁷⁰ In Hungarian law, judicial review of the legality of administrative decisions covers breaches of both procedural and substantive law, while it excludes the review of the merits of the administrative decision taken under direct statutory or discretionary powers. The division between the review of legality and the review of merits is, however, not always clear in Hungarian law.¹⁷¹

While Article 6 European Convention on Human Rights (ECHR) on the right to a fair trial in a reasonable time should, in principle, have had an important influence in Hungary, this was not the case in procedures involving the GVH. Hungarian court proceedings in judicial review have consistently refused to apply Articles 6 and 8 ECHR, even though undertakings almost always invoked the quasi-criminal nature of the proceedings in judicial review against the GVH's decisions.¹⁷² However, more recently both the Hungarian Constitutional Court and the Hungarian Supreme Court have acknowledged that cartel proceedings are quasi-criminal proceedings requiring special guarantees.¹⁷³ Hungarian courts

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ General Administrative Law Act, art 8:72a.

¹⁷⁰ Administrative Procedure Act, s 109(1); Code of Civil Procedure, s 339.

¹⁷¹ A Kovács and M Varjú, 'Hungary: The Europeanization of Judicial Review' (2014) EPL 195. The Hungarian Code on Civil Procedure recognises two types of questions of fact: simple facts and facts the determination of which requires expert knowledge. Their separation is often controversial, especially in competition law, in which economics-based evidence is used. Often it is unclear whether the public authority has to assess a question of expert evidence or a question of law.

¹⁷² Kovács and Varjú, *ibid.*; Decision Vj-130/2006/239, point 8; Judgment 2Kf.27.360/2006/29; Judgment Kfv.IV.39.399/2007/28. The application of art 8 ECHR was raised in Hungarian law concerning 'dawn raids' by the competition authority at the headquarters of a company suspected of severe violations of competition law. Courts have been reluctant to extend the notion of 'private life' to such instances.

¹⁷³ Constitutional Court decision no. 30/2014 and Supreme Court judgment no. Kfv.III.37.690/2013/29.

are thus competent to fully review the GVH's cartel decisions and to substitute the GVH's decision with their own, for example, to reduce the fines imposed by the GVH. In 2015, the Hungarian Constitutional Court also investigated how certain procedural guarantees should apply in cartel proceedings.¹⁷⁴ Another problem with Hungarian administrative courts is that they fail to recognise economic interests, even the interests of competitors in competition cases, as direct legitimate interests capable of securing standing in judicial review.

In light of these significant differences among Member States as to the level of judicial protection, it can make a remarkable difference for an undertaking as to which Member State investigates the case and enforces the competition rules. In this respect it is problematic that the decision to allocate cases to one or other Member State cannot be appealed. As mentioned above, while case allocation is a core function of the ECN, the ECN lacks legal personality and thus no judicial control takes place by either the national or the EU judiciary as the General Court has confirmed.¹⁷⁵ This leaves fundamental questions of jurisdiction and, more importantly, the question by whom and how the ECN can be held accountable, unanswered.

4. Conclusion

EU competition law is enforced in a system where NCAs and the Commission act in parallel rather than sharing the enforcement of Articles 101 and 102 TFEU. These competition rules can be enforced by a single NCA with or without the assistance of authorities from other Member States, by several NCAs acting in parallel, or by the Commission. Rules for case allocation and close cooperation are laid down in the framework of the ECN in order to achieve uniform and consistent application of Articles 101 and 102. The ECN's two main functions are allocating cases and exchanging information. The ECN has neither a legal personality nor autonomous powers of enforcement. It is its members who, on the basis of EU and national laws, enforce the competition law provisions of the Treaty. As such, these members can be held accountable for their respective enforcement actions. Both the Commission and the NCAs are politically accountable to the EP and national parliaments respectively. Our analysis shows, first, that the ECN is not held accountable at either by the EU or the national parliaments, and second, that political accountability differs across

¹⁷⁴ Decision no. 3100/2015. AZ ALKOTMÁNYBÍRÓSÁG 3100/2015. (V. 26.) AB HATÁROZATA alkotmányjogi panasz elutasításáról.

¹⁷⁵ Case T-340/03 *France Telecom SA (formerly Wanadoo Interactive SA) v Commission of the European Communities* [2007] ECR II-107.

Member States and be even seriously undermined in practice.

Likewise, it is the members of the ECN that are separately held accountable by the EU and national courts. In theory the EU Courts comply with the principle of effective judicial protection and conduct a comprehensive review, although the deferential review pertaining to complex economic assessments by the Commission has been criticised by different authors. In addition, judicial accountability is limited by certain developments such as the use of settlements. The level of judicial protection among the Member States differs and depends on procedural rules, such as the burden and standard of proof, the expertise of the judiciary and the scope and intensity of the review. In light of these significant differences among Member States as to the level of judicial protection, it can make a significant difference for an undertaking and have a relevant impact on the protection of their rights of defence, as to which Member State enforces the alleged infringement. In this respect it is problematic that the decision (or no decision) on case allocation and on information exchange is not subject to either political or judicial control.

It is this aspect of the shared enforcement of EU competition law that is in need of reassessment. There is also a need for a composite accountability mechanism which is based on similar network governance such as the Network of National Ombudsmen.